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In the Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE PETITIONERS

Edward Thomas Schilling
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
(414) 276-1122

and

Ernst J. von Briesen
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
(414) 276-1122

Counsel for Petitioners

of Counsel:

VON BRIESEN & REDMOND, S.C.
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202

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BRIEF FOR THE PETITIONERS

QUESTIONS PRESENTED

I. Whether church elementary and secondary schools are exempt from coverage under the Federal Unemployment Tax Act, as adopted by the State of South Dakota?

II. Whether there is a significant risk that a First Amendment right will be infringed so that there must be a clear expression of affirmative intent by Congress to include church elementary and

secondary schools within the Federal Unemployment Tax Act, as adopted by the State of South Dakota?

III. Whether application of the Federal Unemployment tax Act as adopted by the State of South Dakota to church elementary and secondary schools, violates the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDING

All parties to the proceedings from the Supreme Court of South Dakota are included in the caption of the case before this Court. The United States is not a party to the case but has indicated its interest by filing a memorandum to the Petition as amicus curiae. The States of Alabama and Nevada also are not parties to the case but have indicated their interest by filing its Memorandum to the Petition as amici curiae.

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OPINIONS BELOW

The opinion of the South Dakota Supreme Court, reported at 290 N.W.2d 845 (S.D. 1980), appears in the appendix to the petition for the writ (Pet. App. A1-A24). The opinion of the Circuit Court, Sixth Judicial Circuit of South Dakota, not reported, appears in the appendix to the petition for the writ (Pet. App. A25-A34). The opinion of the Appeals Referee for the South Dakota Department of Labor — Unemployment Insurance Division, not reported, also appears in the appendix to the Petition for the Writ (Pet. App. A35-A45).

JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on March 26, 1980. A timely petition for rehearing was denied on May 2, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The relevant provisions of 26 U.S.C. §3309(b) (1970), as it existed prior to the Unemployment Compensation Amendment Act of 1976, Pub.L.No. 94-566, §115, 90 Stat. 2670, which in effect, repealed Sec. 3309(a)(3) (1970), are as follows:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization

which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

(3) in the employ of a school which is not an institution of higher education.

The relevant provisions of the South Dakota statutes, S.D. Compiled Laws Ann. §61-1-10.4, adopted to conform to federal law, as it existed prior to January 1, 1978 (before repeal of S.D. Compiled Laws Ann. §61-1-10.4 (3) are as follows:

(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education; or

. . . .

STATEMENT OF THE CASE

A. Brief Statement of The Facts and The Proceedings Below

Northwestern Lutheran Academy is a four year preparatory school for entrance at Northwestern College or Dr. Martin Luther College in preparation for the preaching or teaching ministry (Pet. App. A39).

St. Martin Evangelical Lutheran Church is a Lutheran church that operates a parochial elementary school (Pet. App. A38).

Northwestern Lutheran Academy, which is not separately incorporated, but is owned and operated by the Wisconsin Evangelical Lutheran Synod, and St. Martin Evangelical Lutheran Church, which is separately incorporated as a church under South Dakota law, are both members of and part of the Wisconsin Evangelical Lutheran Synod (Pet. App. A36).

The Wisconsin Evangelical Lutheran Synod currently has 1105 member congregations in 47 states and three provinces of Canada (Pet. App. A36). Many of its member churches maintain elementary Christian day schools like the school maintained by St. Martin Evangelical Lutheran Church. In addition to area Lutheran high schools, which are maintained by associations of member churches, the Synod maintains four academies, of which Northwestern Lutheran Academy is one, two colleges and one theological seminary (Pet. App. A36).

Further appropriate facts are in the Findings of Facts found in the Administrative Decision by the hearing officer for the South Dakota Department of Labor (Pet. App. A36-A40).

Prior to January 1, 1978, the Federal Unemployment Tax Act (26 U.S.C. §3301 et seq.) permitted states to exempt certain services from taxation, which were codified in South Dakota in S.D. Compiled Laws Ann. §61-1-10.4.

In 1976, the Federal Unemployment Tax Act was amended by Pub.L.No. 94-566, §15, 94 Stat. 2670, "The Unemployment Compensation Amendment Act of 1976," and as required by Congress, the South Dakota legislature, among other things, in effect repealed the elementary and secondary school exclusion contained in subsection (3) of S.D. Compiled Laws Ann. §61-1-10.4.

Thereafter, in December of 1976 and February of 1977, the U.S. Department of Labor issued two interpretive memoranda to state labor agencies explaining the repeal of 26 U.S.C. §3309(b)(3). These memoranda stated that the exemptions of 26 U.S.C. §3309(b)(1) and (2) would continue to apply to church schools. (J.A. 34; J.A. 36)

Then, in April 1978, the U.S. Secretary of Labor announced in a letter to the Most Reverend Thomas C. Kelly, General Secretary of the U.S. Catholic Conference, that the repeal by Congress of the primary and secondary school exclusions intended to result in unemployment compensation coverage of church related schools. Memoranda of this interpretation by the U.S. Secretary of Labor were given to the States (J.A. 40). The South Dakota Department of Labor then issued a determination that Northwestern Lutheran Academy and the school which is a part of St. Martin Evangelical Lutheran Church were subject to coverage under unemployment insurance law.

This determination was appealed by the church and the Wisconsin Synod to an Appeals Referee of the South Dakota Department of Labor. The Administrative decision (Pet. App. A44) held that Northwestern Lutheran Academy and St. Martin Evangelical Lutheran Church were not exempt from the unemployment compensation law, that male teachers were ministers exempt from coverage, but that female teachers were not ministers nor members of a religious order and therfore subject to coverage. The Appeals Referee further stated that because of the directive from the U.S. Department of Labor mandating coverage of church schools the Church's constitutional argument could not be accepted.

Northwestern Luthern Academy and St. Martin's Evangelical Lutheran Church appealed to the Circuit Court. The court concluded in its Memorandum Decision dated March 19, 1979, that the operation of these church schools was primarily for a religious purpose, and that they were exempt under the Act from coverage. The court did not find it necessary to address the constitutional issues raised nor whether female teaching ministers were exempt from coverage. (Pet. App. A33)

The State of South Dakota appealed from the judgment of the Circuit Court to the South Dakota Supreme Court of South Dakota which reversed the Circuit Court (Pet. App. A1). The South Dakota Supreme Court held that Congress "apparently" intended to include elementary and secondary church schools within the unemployment compensation law when it repealed the elementary and secondary school exemption in 26 U.S.C. §3309(b)(3); that coverage of elementary and secondary church schools does not infringe on the freedom of religion guaranteed by the First Amendment to the Constitution; that

coverage would not foster excessive entanglement even though "inclusion . . . will necessarily call for increased involvement between the state and the schools . . ."; and, that female teachers are not exempt from coverage as members of religious orders or as ministers because "they are allowed to perform only those functions normally associated with basic eduaction."

B. General Outline of Statutory History

The Federal Unemployment Tax Act, 26 U.S.C. §3301-3311, referred to herein as FUTA, had its origins in the Social Security Act of 1935, Pub.L.No. 221, 49 Stat. 620 (1935) (codified at 42 U.S.C. §301-1397f). It creates a comprehensive, complex federal-state unemployment compensation program, the history of which has been one of steadily increasing coverage, not only with respect to the types and number of employees covered, but also in terms of the amount of tax involved and benefits paid. FUTA imposes a federal tax on "for profit" employers with incentives to states who adopt federally approved programs. These incentives are credits to employers against the federal tax for amounts paid into a state unemployment fund and direct grants to the state for the administration of its unemployment compensation program. *See* 26 U.S.C. §3302(a), (b); 29 U.S.C. §49(d) (1976); 42 U.S.C. §501 (1976). To receive these incentives the Secretary of Labor must certify that the provisions required by FUTA are contained in the state's laws and that the state has substantially complied with those laws during the annual certification period. 26 U.S.C. §3304(c). Accordingly, all states including South Dakota have enacted so called "mirror images" of the required FUTA provisions. For a discus-

sion of the history and operation of FUTA see Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69, 72-76.

Prior to 1970, all services performed for nonprofit organizations were not required to be included within the state's unemployment compensation program. In 1970 FUTA was amended by the addition of section 3309, requiring state coverage of nonprofit organizations but specifically exempting under section 3309(b)(1)(2) and (3) services performed:

> (1) In the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

Congress, by the Unemployment Compensation Amendments of 1976, Pub. L. N. 944-566, §115, 90 Stat. 2670, deleted the elementary and secondary school exemption contained in section 3309(b)(3), and, as required, South Dakota repealed subsection (3) of its mirror image statute. Congress retained the church exclusion contained in section 3309(b)(1).

Shortly after the deletion of the exemption in section 3309(b)(3) the Department of Labor, in a December 7, 1976 memorandum to all state unemployment agencies,

advised that the deletion of the exemption in section 3309 (b) (3) "does not affect the optional exclusion in 3309 (b) (1)" for church related schools. (J.A. 34)

Thereafter, on February 2, 1977, the Department of Labor in another memorandum to state agencies reconfirmed that, "[t]he changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309(b) (1) (A) and (B)." (J.A. 36) In this February, 1977 memorandum to the states the Department of Labor made it clear that the criteria for determining exemption for religious organizations is simply to determine "whether the workers in question are employed by a church . . ." and that this determination could be made "only after a thorough analysis of the legal interests and relationships between the organization and the church." (J.A. 39)

More than a year later on March 29, 1978, the Solicitor of Labor in a Memorandum to the Secretary, discussed the applicability of the exemption in section 3309 (b) (1) to church elementary and secondary schools. (J.A. 40). The Solicitor, after describing three possible interpretations of section 3309(b) (1) as it relates to church schools, stated that she would be "comfortable defending" any of the three positions (J.A. 52). Noting that the Department of Labor's Employment and Training Administration had been "informally indicating a coverage position to the state agencies" (J.A. 51) the Solicitor, recognizing "possible constitutional involvement," concluded that she favored a "coverage" position because "[a] change to a 'no coverage' position now . . . most likely will alienate state agencies most of whom have been supportive of coverage." (J.A. 50)

Thereafter, on May 30, 1978, the Department of Labor reversed itself and directed all state agencies to inform church related elementary and secondary schools of their coverage under unemployment compensation law and that the only services exempt from coverage under section 3309(b)(1)(A) are "those strictly church duties performed by church employees at the schools pursuant to their church responsibilities" (J.A. 42) and that section 3309(b)(1)(B) had no applicability whatsoever to church elementary and secondary schools. (J.A. 42)

SUMMARY OF ARGUMENT

When FUTA was amended in 1976 to require the states to repeal the elementary and secondary school exclusion as of January 1, 1978, the exemptions from unemployment compensation law available to church elementary and secondary schools under Sections 3309 (b)(1)(A) and (B) of FUTA were not affected. Because the actual employer is the church the exemptions belong to the church as an entity. Yet the South Dakota Supreme Court ignores the plain and unambiguous language in interpreting the state mirror image of the federal statute and says that the threshold question on the appeal involves a determination of congressional intent with respect to repeal of the elementary and secondary school exclusion attempting to find support in legislative history where none exists.

The South Dakota Supreme Court ignores well established case law authority that statutes should be construed to avoid constitutional conflicts, and further ignores the rule established in *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979), that, as here, there is a significant risk that First Amendment rights under the Religion Clauses

might be infringed there must be a clear expression of affirmative intent by Congress to require states to include church elementary and secondary schools within their unemployment compensation laws.

If the court determines that the South Dakota Supreme Court correctly interpreted the law to require coverage of church elementary and secondary schools, such coverage would violate both the Religion Clauses of the First Amendment requiring that the decision by the South Dakota Supreme Court be set aside.

ARGUMENT

I. THE SOUTH DAKOTA SUPREME COURT INCORRECTLY INTERPRETED SECTION 3309 OF FUTA IN DENYING CHURCH ELEMENTARY AND SECONDARY SCHOOLS EXEMPTION FROM THE UNEMPLOYMENT COMPENSATION LAW.

Section 3309(b)(1) of FUTA provides an exemption for services performed in the employ of:

> (A) ". . . a church or convention or association of churches"; or
>
> (B) ". . . an organization which is operated primarily for religious purposes . . ."

The proper analysis in determining whether the particular services are exempt was set forth in a memorandum from the U.S. Department of Labor to all states dated February 2, 1977:

> Thus, under Section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed

> by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the organization is operated primarily for religious purposes. (J.A. 39)

Under this analysis church elementary and secondary schools are exempt because they fall within the word "church" or, because they are operated primarily for religious purposes.

A. The Relevant Issue is Construction of the Exemption for Services in the Employ of a Church and not Congressional Intent

It is an elementary principle of statutory construction that when the words of a statute are clear the plain language of the statute is controlling. *See TVA v. Hill,* 437 U.S. 153, 173, 184 n.29 (1978); *Ex Parte Collett,* 337 U.S. 55, 61 (1949); *Caminetti v. United States,* 242 U.S. 470, 485 (1917)

Laws should mean what they express when they are worded in plain and unambiguous terms, and where there is no ambiguity, there is no room for construction. *United States v. Lexintgon Mill and Elevator Company,* 232 U.S. 399, 409-410 (1914); *Yates v. United States,* 354 U.S. 298, 305 (1957). In addition it is a well established rule of statutory construction that a meaning will be inferred to preserve its constitutional validity. *Ex Parte Mitsuye Endo,* 323 U.S. 283, 299 (1944)

Yet contrary to this well-accepted principle the South Dakota Supreme Court begins its decision by stating that the threshold question before it involved "congressional intent with respect to repeal of section 3309(b)(3) of FUTA (which resulted in the effective repeal of SDCL 61-1-10.4(3)." (Pet. App. A5)

B. Services Performed in Church Elementary and Secondary Schools are Exempt Because They are Services in the Employ of a Church

The South Dakota Supreme Court majority does not discuss the exclusion for services in the employ of a church or convention or association of churches provided for in 26 U.S.C. §3309(b)(1)(A) or the South Dakota mirror statute, S.D. Compiled Laws Ann. §61-1-10.4 (1)(a).

The critical interpretation to be made is what the statutory language, "service performed . . . in the employ of . . . a church . . ." means. The starting point in every case involving construction of a statute should be the language itself. *Southeastern Community College v. Davis,* 442 U.S. 397, 405 (1979) Does the word "church" refer to a body of believers or is it limited to be synonymous with an individual house of worship maintained by a particular congregation as the Appeals Referee for the South Dakota Department of Labor says it has been interpreted to the states to mean? (Pet. App. A43)

We submit that within the context of the quoted statutory language a "church" must be deemed to be an organization or entity and not a church building or structure.

Common usage of the term "church" refers to a body or organization of religious believers. (Webster's New Collegiate Dictionary, American Heritage Dictionary, and Black's Law Dictionary) This definition of church was said to include schools by the Federal District Court in *McCormick v. Hirsch,* 460 F.Supp. 1337, 1353 (1978) where the court said "the Supreme Court's definition of the schools is that it is the church itself."

If the term "church" in isolation is ambiguous, which we submit it is not, the context of the statute absolutely forecloses equation with a physical building. Both FUTA and the applicable South Dakota law support the premise that the word church has to be defined as an organization or entity and not as a structure.

26 U.S.C. §3306(a)(1) defines the word "employer" to include "any person who . . . paid wages . . ." The wages come from a body of believers not a building.

26 U.S.C. §3306(i), §3121(d)(2) defines "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Pertinent regulations provide that an employer-employee relationship exists when facts show that the employer has the right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place to work. *See* 26 C.F.R. §31.3121(d)-1(c)(2) (1979)

S.D. Compiled Laws Ann. §61-1-3 defines for purposes of the unemployment compensation tax an "employing unit as "any individual or type of *organization* . . . which . . . has . . . had in its employ one or more individuals performing services for it . . ." (Emphasis supplied). S.D. Compiled Laws Ann. §61-1-4.(1) defines "employer" as "any employment unit . . ."

Considering the context in which "church" appears in the statutes it is untenable to argue that the term could mean a physical building. Interpreting the word "church" to apply only to a building would make the statute absurd and ineffectual in every circumstance.

One need look no further than the language of the permissible exemptions contained in present sections

3309(b)(3), (4) and (5) of FUTA to demonstrate that Congress did not intend "church" to be limited to types of duties, programs or activities rather than the organization or entity itself.

If there remains any ambiguity in the meaning of "church," the legislative history of the term clearly demonstrates that it refers to a body of worshipers.

FUTA is a tax act, both as administered by the federal government and the states. It is a part of the Internal Revenue Code and should be interpreted to conform with other sections of the Internal Revenue Code. The term "church" has been consistently interpreted to include, as one of its essential components, the parochial school as an integral part of the church. For example, the Internal Revenue Service has interpreted the phrase "churches, their integrated auxiliaries, and conventions or associations of churches" in 26 U.S.C. §508(c)(1) to include religious schools. *See* 26 C.F.R. §1.508-1(a)(3)(a)

In 1954 the question of defining the term "church" arose before the U.S. Senate. The Senate Finance Committee in a report stated that the term church should be all inclusive and is intended to include organizations which, as integral parts of the church, are carrying out the functions of the church, whether as separate corporations or otherwise. *See* Senate Report No. 83-1622, 83rd Congress, 2d Session, page 30; *See also* 1955 *Summary of the Provisions of the Internal Revenue Code of 1954 (HR8300) as Agreed to by the Conferees,* p. 19.

The record in this matter clearly demonstrates that the services performed in the church schools are services in the employ of a church or convention or association of churches. We submit that where as here the actual em-

ployer is the church the exemption under Section 3309 (b) (1) (A) of FUTA belongs to the church as an entity, and that all of its employees are exempt.

Every court that has considered the merits of coverage of church schools under unemployment compensation statutes have concluded that they are exempt, or that it would be constitutionally impermissible to cover them. *See* Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69 (1979-80); *Grace Lutheran Church v. North Dakota Employment Security Bureau,* N.D., 294 N.W.2d 767 (1979); *Alabama v. Marshall,* 626 F.2d 366 (5th Cir. 1980); *Employment Division v. Archdiocese of Portland,* 42 Or. App. 421, 600 P2d 926 (1979); *Lutheran Church Missouri Synod v. Bowling,* 89 Ill. App. 3d 100, — N.E.2d — (1980); *Roman Catholic Church v. State of Louisiana,* La. App., 387 So. 2d 1248 (1980).

In *Alabama v. Marshall,* 626 F.2d 366 (5th Cir. 1980), in direct conflict with the South Dakota Court, the Court held that employees of church elementary and secondary schools were exempt from unemployment compensation taxes under section 3309(b) (1) (A) of FUTA. The Court succinctly stated:

> The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the "in the employ of" language of the statute, therefore, if the employees involved are employed by a "church", the exemption belongs to them. Resolution of this question depends upon what is meant by "church" as used in the statute. We are convinced that the plain meaning of "church" re-

quires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this Court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

C. Services Performed in Church Elementary and Secondary Schools Are also Exempt Because They are Services in the Employ of an Organization Operated Primarily for Religious Purposes

The South Dakota Supreme Court erroneously concluded that church elementary and secondary schools are not "operated primarily for religious purposes" required under the alternate exclusion provided under 26 U.S.C. §3909(b)(1)(B). (Pet. App. A6-A9)

The Appeals Referee for the South Dakota Department of Labor made numerous findings. Among them were the following:

> The object and purpose of the Wisconsin Evangelical Lutheran Synod, as set forth in its constitution is to extend and conserve the true doctrine and practice of the Evangelical Lutheran Church. One method of doing this is by establishing and maintaining schools. (Pet. App. A36)
>
> The Synod believes a theological basis exists for their schools. It holds the conviction that training youth involves both education and religion and that the two are so closely interwoven they cannot be separated; further, they operate their schools in accordance with these beliefs. (Pet. App. A36)

> *All* courses offered at the school which is a part of St. Martin's Evangelical Lutheran Church are taught from a religious viewpoint based on the Scriptural convictions of the Synod. (Pet. App. A39)
>
> The courses taught at Northwestern Lutheran Academy are taught from the same religious viewpoint as the courses taught at the school operated by St. Martin's Evangelical Lutheran Church. (Pet. App. A40)
>
> The Synod has both preaching ministers and male teaching ministers, both of whom have equal status in the church and can perform all of the sacerdotal functions of the Church. (Pet. App. A37-38)
>
> The teaching ministers at the Christian schools are considered part of the public ministry of the Wisconsin Evangelical Lutheran Synod. They receive a divine, lifelong "call" to the position in which they serve. (Pet. App. A37-A38)

The Appeals Referee's findings were based on the record made before it. Introduced was a comparison between the education offered by the Christian parochial school and the secular school (Pet. Exhibit 4, Adm. Record, pp. 106-112); a statement of the philosophy and objectives for Synod Christian day schools which shows the permeation of religious belief into the total curricula (Pet. Exhibit 5, Adm. Record, pp. 95-105); another statement of curriculum objectives to inculcate religious doctrine into everything that is taught (Pet. Exhibit 6, Adm. Record, pp. 91-94); and the Constitution of the Wisconsin Evangelical Lutheran Synod. (Pet Exhibit 3, Adm. Record, p. 113)

The role of the Christian school in the mission of the Wisconsin Synod was stated by Martin Luther in the Book of Concord 1580 which includes the Small Catechism of Martin Luther:

> The school must be next to the church . . . when the schools increase, all is well, and the church remains

> pure . . . for the sake of the church it is therefore, necessary to have and maintain schools, for God preserves the church through the schools.

The Wisconsin Synod's position on Christian schools is stated in *An Appraisal of Educational Principles in the Light of Scripture,* wherein it is stated:

> The Christian school is one of the most important agencies the Lord has given us to carry out His great missionary command in these chaotic times. Therefore let us pray to Him to strengthen our faith, . . . and grant us the courage to carry out His command to bring up the children in the nurture and admonition of the Lord. (Pet. Exhibit 4, Adm. Record, pp. 106-112)

The object and purpose of the Wisconsin Evangelical Lutheran Synod is to extend and conserve the true doctrine and practice of the Lutheran Church. To fulfill this mission the church has established Christian schools and holds the conviction that training of youth involves both religion and education which are so closely interwoven that they cannot be separated. (Pet. App. A36) The sole purpose in operating church schools is religious.

The Supreme Court of the United States has consistently acknowledged that parochial elementary and secondary schools are an integral part of the church and a vital part of its religious mission.

In *Meek v. Pittenger,* 421 U.S. 349, 365 (1975) the Court stated:

> It would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools . . .

At page 366 the Court, quoting from *Hunt v. McNair,* 413 U.S. 734, 743 (1973), referred to the schools as institutions "in which religion is so pervasive that a substantial portion of . . . their functions are subsumed in the religious mission . . ." The Court then explained (at 366):

> The church related elementary and secondary schools typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. *See Lemon v. Kurtzman,* 403 U.S. at 616-7 . . . The secular education those schools provide goes hand in hand with the religious mission that is the only reason for the school's existence. Within the institution, the two are inextricably intertwined.

In *Lemon v. Kurtzman,* 403 U.S. 602 (1970), at page 616, the Court explained:

> On the basis of these findings the District Court concluded that the parochial schools constituted an integral part of the religious mission of the Catholic Church. "The various characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary school particularly. In short, parochial schools involve substantial religious activity and purpose.

Justice Douglas, in his concurring opinion, beginning at page 635, discusses the parochial school curriculum:

> But the problem only starts there. Sectarian instruction, in which, or course, a state may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is what is *taught* . . .

> It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind.

In Footnote 20 to Justice Douglas' concurring opinion, at page 635, he states:

> In the parochial schools . . . indoctrination is included in every subject. History, literature, geography, civics and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system.

And on page 637, Justice Douglas continues:

> Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.

If it were not for the purpose of inculcating religious doctrine into the curricula, there would be no reason whatever to run a separate school system coterminous with that provided by the State. So important is this mission to the Synod, that it even provides a dual ministry, that of the teaching ministry and the preaching ministry. Synod schools exist *solely* for religious purposes.

The South Dakota Supreme Court's holding that the Christian schools are not primarily religious results in the incongruous determination that parochial schools are an integral part of the church so as to be denied state aid, but that they are a separate and distinct entity from the churches that are not religious enough to be exempt from the unemployment compensation tax. In *Catholic Bishop v. NLRB,* 559 F.2d 1112, 1119 (7th Cir. 1977), the Court recognized this incongruous result when it stated:

> . . . the Board is cruelly whip-sawing their schools by holding that institutions too religious to receive

governmental assistance are not religious enough to be excluded from its regulation.

(*See also McCormick v. Hirsch,* 460 F.Supp. 1337, 1352, 1358 (M.D. Pa. 1978)

D. The Department of Labor's Interpretation Should not Have Been Entitled to Great Deference by the South Dakota Supreme Court

The South Dakota Supreme Court states that "when faced with the problem of statutory construction, we must show great deference to the interpretation given such statutes by the agency charged with their administration." (Pet. App. A9) The Court then referred to the Department of Labor's interpretation of the 1970 amendments relating to *institutions of higher education,* and infers a consistent construction by the department.

The legislative history and the department's inconsistent interpretation do not support the South Dakota Supreme Court. Immediately after the 1976 Amendments were passed, the Department of Labor issued its advice that the deletion of 3309(b)(3) of FUTA "does not affect the optional exclusion of 3309(b)(1)" for church related schools. (J.A. 34) Again in February, 1977, the Department of Labor in another memorandum to state agencies reconfirmed that "[the] changes made in Section 3309 by P.L. 94-566 do not change the application of the exclusions in Section 3309(b)(1)(A) and (B)." (J.A. 36) Completely reversing itself more than a year later, on May 30, 1978, the Department of Labor advised the states that church elementary and secondary schools would have to be included by the states in their unemployment compensation laws. (J.A. 40) This last interpretation by the Department of Labor was not consistent

with its earlier interpretation, nor was it contemporaneous.

"Great deference" by the Courts to an administrative agency's interpretation of a statute was discussed in *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-145 (1976). *See also, Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *General Electric Co., supra,* 142, the Court states:

> The weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . .

Applying these standards to the Department of Labor's last interpretation of the exemptions provided for in section 3309(b)(1) of FUTA the department does not fare well. The latest interpretation by the department in 1978 was not a contemporaneous interpretation and certainly was not consistent with its earlier interpretations.

In *General Electric Co., supra,* 143, the Supreme Court states that "[W]e have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."

The most difficult obstacle to according any deference to the latest interpretation by the Department of Labor is that it contradicts the plain language of section 3309 (b)(1) of FUTA and goes far beyond any expressed Congressional intent. "Administrative determinations must have a basis in law and must be within the granted authority . . ." *Social Security Board v. Nierotko,* 327 U.S. 358, 369 (1945)

II. THE DECISION BY THE SOUTH DAKOTA SUPREME COURT IS CONTRARY TO THE DECISION IN *NLRB v. CATHOLIC BISHOP*, 440 U.S. 490 (1979), BECAUSE THERE WAS NO CLEAR EXPRESSION BY CONGRESS OF AN AFFIRMATIVE INTENT TO BRING CHURCH SCHOOLS WITHIN STATE UNEMPLOYMENT COMPENSATION LAW.

As we will show in Section V below, if church schools are brought within state unemployment compensation laws the state would become entangled in church affairs in that church officials would be required to file reports with state agencies, keep work records which would be open at any time to state officials, answer subpoenas for information, respond to claims for benefits, participate in hearings on benefit eligibility, and be liable for civil and criminal penalties for noncompliance with the law. Another problem arises in determining whether an employee is discharged for misconduct or has terminated his employment without cause. Yet another problem involves the determination of what part of a teacher's employment is "religious" and what part is "secular". All of this church-state involvement raises serious constitutional questions under the First Amendment. This being so, there must be "an affirmative intention of the Congress clearly expressed" to require that church elementary and secondary schools be brought within unemployment compensation law. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) In the legislative history of the case before this Court there is no evidence whatever of such Congressional intent.

The Solicitor of Labor in discussing Section 3309(b)(1) of FUTA admits that "if subsection (1) applied to

church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the legislative history is silent." (J.A. 52)

The South Dakota Supreme Court refers to an estimated figure of 242,000 employees of non-public elementary and secondary employees to justify his conclusion of intent by Congress to include church schools under unemployment compensation law (Pet. App. A8), referring to S. Rep. No. 94-1265, 94th Cong., 2d Sess. (1976), at 8. The footnote to the figure given in that Senate Report then refers to 261,000 full time teachers in non-profit schools, a figure 19,000 higher than the 242,000 referred to, which figure does not include other school employees. There is no evidence that Congress understood this figure and it can hardly now be taken as a "clear" expression of Congressional intent to cover church elementary and secondary schools. (*See U.S. Department of Labor Administrative Law Judge Recommended Decision in Conformity Proceeding involving United States Department of Labor vs. Alabama and Nevada*, J.A. 19, at 31)

The fact that Congress manifested its concern to the constitutionality of its coverage of state employees (S. Rep. No. 94-1265, 94th Cong., 2d Sess. (1976) at 8-9), yet failed to mention the more obvious constitutional questions involving parochial school coverage, or even refer to or mention church elementary and secondary schools in its reports makes it seem incomprehensible that Congress intended the 1976 Amendments to remove church schools from the exemptions it previously granted under Section 3309(b)(1) of FUTA.

III. THE ELIMINATION OF THE EXCLUSION FOR SERVICE IN THE EMPLOY OF A SCHOOL DOES NOT AFFECT THE EXCLUSION FOR SERVICE IN THE EMPLOY OF A CHURCH.

In 1976 when FUTA was amended by the Unemployment Compensation Amendments of 1976, the states were required, among other things, to extend coverage to most state and local government employees, agricultural workers and domestic servants. At this time the exemption for service performed "in the employ of a school which is not an institution of higher education" was eliminated, but significantly, the exemptions for services performed in the employ of a church provided for in section 3309 (b) (1) were not disturbed. The school exclusion had to be removed so that there would be no inconsistency concerning coverage of public school employees and nonprofit schools other than church elementary and secondary schools.

IV. THERE IS NO EVIDENCE OF CONGRESSIONAL INTENT TO INCLUDE CHURCH ELEMENTARY AND SECONDARY SCHOOLS UNDER UNEMPLOYMENT COMPENSATION LAW.

The Supreme Court of South Dakota erroneously concluded that Congress "apparently" intended the states to extend their unemployment compensation laws to parochial elementary and secondary schools. (Pet. App. A5-A8) It did not find a clear expression of congressional intent but, rather, an "apparent" intent.

The Department of Labor recognized that the exemptions might continue to apply to church schools because

the legislative history is silent. The Solicitor of Labor, discussing Section 3309(b)(1) of FUTA admits that "if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply *since the legislative history is silent.*" (Emphasis added) (J.A. 52)

The South Dakota Supreme Court cites The House Ways and Means Committee Report (H.R. Rep. No. 91-612, 91 Cong., 1st Sess., 11 (1969) which it says demonstrates Congressional intent in 1970 to extend coverage to religious organizations (Pet. App. A6) The South Dakota Supreme Court ignores the fact that Congress provided a specific exemption for services performed in the employ of a church or convention or association of churches (Title 26 U.S.C. §3309(b)(1)(A), and a specific exemption for an organization which is operated primarily for religious purposes and which is "operated . . . by a church or convention or association of churches . . ." (Title 26, U.S.C. §3309(b)(1)(B), and further specific exemption for *all* elementary and secondary schools. (Title 26, U.S.C. §3309(b)(3).

The Court cites further language from the same Congressional report, H.R. Rep. No. 91-612, 91 Cong. 1st Sess. 44 (1969) and identical language in S.Rep. No. 91-752, 91 Cong., 2d Sess. (1970), at 48-59, U.S. Code, Cong. and Admin. News 1970, p. 3606, which reads as follows: (Pet. App. A6-A7)

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled or principally supported by a church (or

> convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would be a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or home for the aged) would not be considered to be operated primarily for religious purposes.

The quoted language from these Congressional reports show that Congress intended the exemptions it provided in section 3309(b)(1) of FUTA to depend on *the nature of the empolying organization* and not the kind of services performed such as in the case of the janitor for the church. When Congress referred to "church related" organizations as "separately incorporated", it recognized that services performed at a school with no legal existence apart from the church are services performed *in the employ of* the church and thus, exempt from coverage under section 3309(b)(1)(A) of FUTA.

The South Dakota Supreme Court also emphasizes the Congressional Committee's statements relating to church-related colleges as being conclusive in construing the "operated primarily for religious purposes" language in section 3309(b)(1)(B) of FUTA ignoring the fact that there are "inherent differences between the college level and the elementary and secondary level of education at church affiliated schools." (*Americans United for Separation of Church and State v. Bubb,* 379 F. Supp. 872, 891 (D. Kan. 1974). The Supreme Court of the United States recognizes the inherent differences between church ele-

mentary and secondary schools and religiously affiliated colleges stating that "the affirmative if not dominant policy of the instruction in pre-college church schools is to assure future adherents to a particular faith by having control of their total education at an early age. . . ." *Tilton v. Richardson,* 403 U.S. 672, 685, 686 (1971) citing *Walz v. Tax Commission,* 397 U.S. 664, 671 (1970) Also, institutions of higher learning have a higher degree of academic freedom and that "by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." (*Tilton v. Richardson, supra,* at 686)

Congressional discussion of separately incorporated church affiliated colleges is irrelevant in considering the section 3309(b)(1) FUTA exemptions granted to church elementary and secondary schools, especially when Congress explicitly limited the section 3309(b)(3) exemption to a school which is *"not an institution of higher education."*

V. SUBJECTING CHURCH ELEMENTARY AND SECONDARY SCHOOLS TO UNEMPLOYMENT COMPENSATION LAW VIOLATES BOTH THE ESTABLISHMENT AND FREE EXERCISE CLAUSES.

A. General Principles of Case Law — Introduction

The First Amendment to the Constitution of the United States consists of two distinct clauses, an "Establishment" Clause and a "Free Exercise" Clause. In *Walz v. Tax*

Commission, 391 U.S. 664, 669 (1969) the Court stated thus:

> [T]he basic purpose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion.

Establishment of a religion connotes "sponsorship, financial support, and active involvement" of government in religious activity. *Walz, supra,* at 668. This First Amendment prohibition does not "simply prohibit the establishment of a . . . church or . . . religion . . ." but instead, commands "that there should be no law *respecting* an establishment of religion." What this means is that there cannot be any step taken by government that could lead to the establishment of a religion. *See Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971) And, at page 612 and 613 the Court concludes (*Lemon, supra*),

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 674.

For further discussion of the three part test developed by the Court in establishment cases *see also, Wolman v. Walter,* 433 U.S. 229, 235-236 (1977); *Roemer v. Board of Public Works,* 426 U.S. 736, 748 (1976); *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-773 (1973).

The Court has also used a three-tiered process in evaluating the "Free Exercise" Clause. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972) the Court held that Wisconsin's compulsory school attendance law violated the free exercise rights of Amish parents who refused to send their children to school after the eighth grade. The Court considered, first, whether the religious claims of the Amish were rooted in a legitimate and sincerely held religious belief (at page 215-216); second, the extent of the governmental burden or inhibition on the free exercise rights of the Amish (at page 217-219); and finally, whether there is "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." (page 214; *see also,* pages 219-234; and, *Sherbert v. Verner,* 374 U.S. 398, 406 (1963)

For an analysis of the Free Exercise Clause and its relationship to parochial schools See Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69, 102-117 (1979-80).

It is submitted that South Dakota has violated *both* of the Religion Clauses of the First Amendment under well defined case law authority.

B. Coverage of Church Elementary and Secondary Schools Violates the Establishment Clause

The major constitutional problem is whether the "increased involvement" between the state and the church resulting from coverage of church schools constitutes excessive government entanglement with religion as formulated by the Court in *Walz v. Tax Commissioner,* 397 U.S. 664, 674 (1970).

The requirement of filing regular reports with state agencies, keeping extensive work records which would be open at any time to state officials for inspection, being subject to enforcement of perceived non-compliance with agency orders or rules, having to respond to claims for benefits, as well as being forced to participate in hearings on eligibility for benefits brings the state directly into an administrative relationship with the Church which the Court warned against in *Walz, supra,* at 672, 675, 695.

In a similar regulatory scheme the First Circuit held as unconstitutional a government investigation of rising educational costs at Church Schools. (*Surinach v. de Busquets,* 604 F.2d 73 (1st Cir. 1979) In *Surinach,* (Id. at p. 78) the court recognized that the government's ongoing powers necessary to ensure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities "[have] the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement." *See also, Catholic Bishop v. NLRB,* 559 F.2d 1112 (7th Cir. 1979), *aff'd.* on other grounds, 440 U.S. 490 (1979); and, *McCormick v. Hirsch,* 460 F.Supp. 1337, 1357 (M.D. Pa. 1978). While *Surinach, supra,* and *Catholic Bishop, supra,* technically were decided on "Free Exercise" grounds, they were decided on the basis of excessive government entanglement.

There cannot be total separation between church and state, such as in the case of fire inspections, building and zoning regulations and state requirements under compulsory school attendance laws (*Lemon v. Kurtzman,* 403

U.S. 602, 614 (1970). The test to determine excessive entanglement is one of degree (*Walz, supra,* 674).

The degree of state involvement becomes overly severe in two instances: when a determination has to be made of what services at the church school are "strictly church duties" and when a determination has to be made on termination of employment for eligibility of benefits.

The U.S. Department of Labor Unemployment Insurance Letter No. 39-78, dated May 30, 1978 (J.A. 40) provides that if an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church related school and a church, and the exempt service amounts to more than 50%, then all of the services of the employee would be exempt.

When Synod teachers receive their "divine, life-long call" from the church in which they are asked to serve (Findings of Fact X, Pet. App. A37-A38; *See, also,* decision by South Dakota Supreme Court, Pet. App. A-14) they have as a specific "church duty" the responsibility of inculcating religious doctrine into everything that is taught (Findings of Fact, XIV, XIX, Pet. App. A39, A40); *See also,* Exhibit 27, Administrative Record, pp. 26, 27). In addition, a janitor and church secretary might perform services for both the church and the school which is a part of the church. A teacher might, as part of his or her prescribed duties, teach Sunday School in the church basement or the school basement, play the organ for church services and be responsible for the church choir. There might be "church" functions in the school and "school" functions in the church. Thus, it becomes necessary to determine in each instance what activities are purely "religious" and what are "secular". That con-

troversies will arise, for example, as to whether in a world history class the teacher spends more than one-half of any given session teaching purely "religious" or purely "secular" history can hardly be subject to doubt. This "puts a public investigator into every classroom and entails . . . pervasive monitoring . . ." (*Lemon v. Kurtzman,* 403 U.S. 602, 629 (1971)

In *Lemon, supra,* the court held unconstitutional a salary supplement program for teachers of secular subjects at non-public elementary schools. The court, speaking on entanglement, said: (*Id.,* 620)

> The Statute excludes teachers . . . whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

McCormick v. Hirsch, 460 F.Supp. 1337, 1351-1352 (M.D. Pa. 1978) summarized the factors considered by the Supreme Court in the then recent establishment cases: (*Id.* 1352)

> The Court . . . has shown a particular concern and has *sought to avoid* active involvement of the sovereign in religious activities, the risks inherent in programs that bring about an administrative relationship between public bodies and church-sponsored schools, governmental evaluation and standards with respect to religious practices, any kind of day-to-day relationship between church and state, extensive investigation into church operations or finances, any

> sustained or detailed administrative relationship for enforcement of statutory or administrative standard, inherent difficulties in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of statutory restrictions, and the entanglement of government in difficult classifications of what is or is not religious. The listing of these suspect areas of entanglement illustrates the kinds of involvement with a church entity that will simply not be tolerated. (Footnotes omitted)

Government involvement becomes even greater when it engages in difficult classifications of what is or is not religious. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . ." (*New York v. Cathedral Academy,* 434 U.S. 125, 133 (1977)

Excessive entanglement also occurs when a teacher's employment is terminated. Under Unemployment Compensation Law an employee who is discharged for misconduct or terminates his employment without cause may have his benefits denied or reduced. (*See* S.D. Compiled Laws Ann §61-6-13 and 14) Thus, it becomes important to determine the reasons for termination. This intrudes the state into religious law and polity. Synod teachers, having accepted a "life-long call" are required to teach Synod doctrine and belief by both word and deed. If a teacher were discharged for teaching contrary to Synod doctrine and belief, or voluntarily terminated employment, the teacher could request a hearing to determine if unemployment compensation benefits were due. [*See* 42 U.S.C. §503(a)(3)] This hearing would involve doctrinal questions of belief and the hearing examiner would have to rule on these issues. It is submitted that civil

authorities are constitutionally prohibited from determining church doctrine in resolving what actually would be an ecclesiastical dispute. (*See Serbian Orthodox Diocese v. Melivojevich,* 426 U.S. 696 (1976); and *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952)

Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd* on other grounds, 440 U.S. 490 (1979), demonstrates the constitutional problems that would be involved in a civil inquiry of the reasons for discharge of a parochial school teacher.

The South Dakota Supreme Court acknowledged that the teachers in Synod schools are not under contract but are under a "call" and that this being so there are only two ways a teacher can be released from that call; by teaching false doctrine and by misconduct as outlined by church standards. (Pet. App. A14) Therefore, that Court says the only finding needed to determine eligibility is simply whether the employee was fired or laid off. (Pet. App. A14) Apparently the South Dakota Supreme Court is saying that the resolution of an unemployment compensation claim would not require an adjudication of what is or is not church doctrine. We strongly disagree. The issue "most frequently disputed" in connection with claims for unemployment is the reason for termination of employment (*California Department of Human Resources Development v. Java,* 402 U.S. 121, 126 (1971). *See also,* Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69, 81 (1979-80). There would be a "necessity of explanation and analysis, and probably verification and justification of the doctrinal precept involved." (*Catholic Bishop, supra,* 1125). Otherwise there would be an accommoda-

tion to the church. *Catholic Bishop, supra,* 1126, said this about accommodation:

> We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional rights being violated . . .

Judge Sprecher, in his concurring opinion added: (*Catholic Bishop, supra,* 1128)

> In concurring with Judge Pell's persuasive opinion, I would only add that the National Labor Relations Board, in attempting to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses, has collided with one and fallen into the other. The Board's assertion of jurisdiction will have the effect of inhibiting the practice of religion by regulating it, yet by conceding that this will inexorably force it to "accommodate" and prefer religious employers and conversely to discriminate against secular employers in like situations, it will in the constitutional sense "establish" the religions with which it deals.

We see no way a claims examiner could steer a course between Scylla and Charybdis to avoid First Amendment problems if a parochial school teacher's employment were terminated on alleged doctrinal grounds.

In *NLRB v. Catholic Bishop,* 440 U.S. 490, 502 (1979) the Court referred to the charges of unfair labor practices that were filed against Catholic elementary and secondary schools including the dismissal of a teacher for teaching a doctrine at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle contrary to Catholic moral teachings (*See Catholic Bishop v. NLRB,* 559 F. 2d 1112, 1125-1126 (7th Cir. 1977). The Court said:

> The resolution of such charges . . . will necessarily involve inquiry into the good faith of the position

> asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.

In a similar case to that of *Catholic Bishop, supra, McCormick v. Hirsch,* 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) the court noted that the National Labor Relations Board would have to determine if a firing was for union or ecclesiastical concern, and that this determination of what is church doctrine and whether it applies would be unconstitutional under the "Free Exercise" Clause.

While the purpose of extending unemployment compensation laws to church schools is not intended to advance or inhibit religion, we submit that the effect of such extension would have the potential to do just that. (*Board of Education v. Allen,* 352 U.S. 236, 243 (1968). What might be "primarily religious" or "religious doctrine" or even "religious belief" might mean one thing to a Wisconsin Synod Lutheran yet quite another to a person of another faith or even a person of no faith. This could lead to the advancing of one religion and the inhibiting of another. This leads to "a relationship pregnant with dangers of excessive government direction of church schools and hence, of churches." *Lemon v. Kurtzman,* 403 U.S. 602, 620 (1971) History cautions that political fragmentation on sectarian lies should be guarded against (*Walz, supra,* 695, 698). The extension of unemployment compensation laws to church elementary and secondary schools aggravates the potential for political divisiveness related to religious belief and practice. (*See Lemon v. Kurtzman,* 403 U.S. 602, 622, 623

(1971). The undisputed facts and the Appeals Referee's findings show that the purpose of Northwestern Lutheran Academy is to provide an education at the secondary level to those who plan to enter the ministry of the church. (Findings of Fact V, XVI, XVII, Pet. App. A36, 37, 39, 40) Against these uncontradicted facts the Appeals Referee concludes that the primary purpose of the Academy is not religious. (Pet. App. A44) The ability to make conclusions at such variance from the facts demonstrate the potential for "advancing" one religion and "inhibiting" another.

C. Coverage of Church Elementary and Secondary Schools Violates the Free Exercise Clause

Extension of unemployment compensation laws to church schools would offend the "Free Exercise" Clause because it would "interfere with religious beliefs and practices or have the effect of doing so." *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970)

Church schools are an exercise of religion. (*See* Comment, *The Free Exercise Clause, The NLRA, and Parochial School Teachers,* 126 U. Pa. L. Rev. 631, 641, 642 (1978) They are the *"raison d'etre"* for the propagation of a religious faith (*Lemon v. Kurtzman,* 403 U.S. 602, 628 (1971) The school is "the church itself". (*McCormick v. Hirsch,* 460 F.Supp. 1337, 1353 (M.D. Pa. 1978) That church elementary and secondary schools are rooted in legitimate and sincerely held religious beliefs cannot be disputed.

While excessive entanglement arose out of the church-aid establishment cases, it is submitted that it is applicable to the "Free Exercise" Clause because it relates to governmental interference with religion. Support for this

conclusion can be found in *McCormick v. Hirsch, supra,* 1353-1356. The court there expressly stated that the "areas that burden or inhibit the religious practices . . . also involve entanglement problems . . ." Thus, all that has been said about entanglement applies to demonstrate the burdening or inhibiting of the religious practices of the Synod in the maintenance of its elementary and secondary schools.

In *NLRB v. Catholic Bishop,* 440 U.S. 490, 496 (1979) the Court referred to the 7th Circuit decision (559 F.2d at 1124). That court referred to the "chilling aspect" of parochial schools being made subject to the National Labor Relations Act. The example cited by the 7th Circuit involved the discharge of a teacher who one week gave a pro-union speech and the next advocated the cause of birth control. The bishop would then be confronted with the choice of foregoing his right to discharge the heretical teacher or to do so at the risk of a protracted and expensive proceeding which would involve the Church's religious policies and beliefs. (*See also McCormick v Hirsch,* 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) We submit the same "chilling aspect" would be present in the case of a teacher termination if church elementary and secondary schools were brought within state unemployment compensation law.

In *Braunfield v. Brown,* 366 U.S. 599 (1961), Sunday closing laws were upheld against the objection of individuals whose religious practices required them to close their businesses on Saturday. The Court in *Braunfield* considered the effect on religious activity to be only indirect. (*Id.* 605-609) In *Sherbert v. Verner,* 374 U.S. 398 (1963) the Court held the application of unemployment compensation laws unconstitutional in denying benefits to a Seventh Day Adventist who refused to accept

Saturday work contrary to her religious belief. While the Court did not find a "direct" burden in *Sherbert, supra,* it is significant that in *Braunfield, supra,* the law affected the business activities of the complainant, while in *Sherbert, supra,* the complainant's personal religious practices would have been affected by having to accept Saturday work. Similarly, like *Sherbert, supra,* and *Wisconsin v. Yoder, supra,* if church elementary and secondary schools are included under unemployment compensation law the burden would directly involve the exercise of religious practices and not a business activity as in *Braunfield, supra.*

No one can deny the socio-economic importance of unemployment compensation law; but, we submit it is not a state interest of sufficient magnitude to override the fundamental rights provided for under the Religion Clauses as stated in *Wisconsin v. Yoder, supra,* 214. Furthermore, there is no showing that the least restrictive goals have been chosen to meet the objects sought to be achieved by extending unemployment compensation law to church elementary and secondary schools. In *Barnett v. Rodgers,* 410 F.2d 995, 1000 (D.C. Cir. 1969) the court pointed out this second requirement of an equally convincing showing that there is no other way to reach the goals desired. This Court said in *Wisconsin v. Yoder, supra,* 215:

> The essence of all that has been said and written on the subject is that only those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion. (Emphasis supplied).

There is a substantial inhibition on those who are brought within state unemployment compensation laws. The court in *Catholic Bishop v. NLRB,* 559 F.2d 1112,

1124 (7th Cir. 1977), *aff'd.* on other grounds, 440 U.S. 490 (1979), speaking about compulsory bargaining, said this:

> ". . . [O]n the general industrial and commercial scene sound policy considerations have upheld this imposition, inhibiting though it may be . . . We do not disagree with the soundness of the legislative policy determinations which have been consistently upheld by the courts. We only say that when that imposition conflicts with the Religion Clauses that the First Amendment protective wall should prevail. See Sherbert v. Verner, 374 U.S. 398, 406-09 (1963).

We submit that what was said in *Catholic Bishop, supra,* should apply here.

CONCLUSION

The South Dakota Supreme Court erred in every respect. It ignored the plain language of the exemptions provided by Sections 3309(b)(1)(A) and (B) and the corresponding South Dakota Statutes; it attempts to find support in what it calls "apparent" Congressional intent where none exists; and, it fails to apply general principles of case law established by the Supreme Court of the United States guaranteeing religious freedoms protected by the First Amendment to the Constitution of the United States.

The petitioners, St. Martin Evangelical Lutheran and Northwestern Lutheran Academy, request the Court to reverse and set aside the Decision by the South Dakota Supreme Court.

Respectfully submitted,

Edward Thomas Schilling
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
(414) 276-1122

and

Ernst J. von Briesen
757 North Broadway, Suite 500
Milwaukee, Wisconsin 53202
(414) 276-1122

Counsel for Petitioners